SUPREME COURT OF NEW JERSEY
C-53 September Term 1994
38,721

Filed September 13, 1994

PATERSON MUNICIPAL UTILITIES AUTHORITY, etc.,

Plaintiff-Petitioner,

—v.—

HACKENSACK WATER COMPANY, etc., *et al.*,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-487-92 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs; and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to *Rule* 2:12-9.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 8th day of September, 1994.

/s/ STEPHEN W. TOWNSEND
Clerk of the Supreme Court
of New Jersey

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-487-92T2

Filed May 2, 1994

PATERSON MUNICIPAL UTILITIES AUTHORITY,
a public body,

Plaintiff-Appellant,

—v.—

HACKENSACK WATER COMPANY, a corporation, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION, a public body,

Defendants-Respondents.

Argued April 13, 1994—Decided May 2, 1994

Before:

Judges GAULKIN, R.S. COHEN and D'ANNUNZIO

On appeal from the Superior Court, Law Division, Passaic County.

Bruce J. Ackerman argued the cause for appellant (Stern, Steiger, Croland, Tanenbaum & Schielke, attorneys; Mr. Ackerman, Kenneth S. Goldrich and Joanne L. Graf, on the brief).

Marty M. Judge argued the cause for respondents (Drinker, Biddle & Reath, attorneys; Mr. Judge and Charles J. Vinicombe, on the brief).

David R. Patterson, Deputy Attorney General, argued the cause for *amicus curiae* State of New Jersey, Department of Environmental Protection and Energy (Deborah T. Poritz, Attorney General; Mary C. Jacobson, Assistant Attorney General, of counsel; Carol Grelecki, Deputy Attorney General, on the brief).

PER CURIAM

Substantially for the reasons expressed by Judge Alterman in his July 23, 1992 letter opinion, we concur in his conclusions that (1) neither the 1791 legislation creating the Society for Establishing Useful Manufactures (SUM) nor any succeeding statutory or decisional law directed "that the SUM's rights to the water running by the Great Falls were to be held without a diminution or alteration" and (2) plaintiff Paterson Municipal Utilities Authority (PMUA), as successor to SUM, "does not have greater rights than any other riparian owner to the waters of the Passaic River." The State's action in allocating portions of the Passaic River waters to others thus cannot be characterized as a taking of property for which PMUA is entitled to be compensated. *Johns-Manville Sales Corp. v. New Jersey Water Supply Auth.*, 211 *N.J.Super.* 315, 320-21 (App. Div. 1986).

Those holdings are dispositive of the appeal. PMUA stated its cause of action as one for a taking of its property without

compensation. PMUA did not, and does not, contend that the State's allocation of water is unreasonable; indeed, the challenge to that allocation by the City of Paterson, PMUA's predecessor in interest, was fully considered and finally rejected in *In re North Jersey District Water Supply Commission*, 175 *N.J.Super.* 167 (App. Div.), *certif. denied*, 85 *N.J.* 460 (1980). We therefore need not, and do not, pass on Judge Alterman's further conclusion that a water allocation made pursuant to the Water Supply Management Act, *N.J.S.A.* 58:1A-1 to 17, "is, as a matter of law, reasonable."

The judgment is affirmed.

/s/ ILLEGIBLE
Clerk

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: PASSAIC COUNTY

DOCKET NO. PAS-L-6702-90

Civil Action Filed August 31, 1992

PATERSON MUNICIPAL UTILITIES AUTHORITY,
a Public Body,

Plaintiff,

—v.—

HACKENSACK WATER COMPANY, a Corporation, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION, a Public Body,

Defendants.

STRYKER, TAMS & DILL
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(201) 491-9500
Attorneys for Defendants
Hackensack Water Company
and North Jersey District
Water Supply Commission

ORDER GRANTING SUMMARY JUDGMENT TO DEFENDANTS

THIS MATTER having been opened to the Court on application of the defendants, Hackensack Water Company and North Jersey District Water Supply Commission (by Stryker, Tams & Dill, attorneys for defendants [Marty M. Judge, Esq. appearing]), and in the presence of the plaintiff, Paterson Municipal Utilities Authority (by Stern, Steiger, Croland, Tanenbaum & Schielke [Bruce J. Ackerman, Esq. appearing]), for an order granting summary judgment to the defendants and seeking dismissal with prejudice of the Amended Complaint of the plaintiff; and the court having considered the papers submitted by all counsel and the arguments made by counsel; and for the reasons set forth in the Court's written opinion dated July 23, 1992; and for other good cause shown;

IT IS ON THIS 31 day of Aug. 1992;

ORDERED that the motion by the defendants, Hackensack Water Company and North Jersey District Water Supply Commission, for an order granting summary judgment to the defendants is hereby granted and the Amended Complaint of the plaintiff, Paterson Municipal Utilities Authority, is hereby dismissed, with prejudice.

/s/ HERBERT S. ALTERMAN, J.S.C.
Herbert S. Alterman, J.S.C.

PAPERS CONSIDERED:

Defendants' Notice of Motion ____

Defendants' Certification of Counsel and Attached Documents ____

Defendants' Memorandum of Law ____

Plaintiff's Opposing Papers ____

Defendants' Reply Papers ____

Other ____

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY

HERBERT S. ALTERMAN
JUDGE

COURTHOUSE
PATERSON, NEW JERSEY 07505

July 23, 1992

Stryker, Tams & Dill, Esqs.
Two Penn Plaza East
Newark, New Jersey 07105

Attention: Marty M. Judge, Esq.

Stern, Steiger, Croland, Tanenbaum & Schielke, Esqs.
One Mack Centre Drive
Mack Centre II
Paramus, New Jersey 07652

Attention: Bruce J. Ackerman, Esq.

Re: Paterson Municipal Utilities Authority vs. Hackensack Water Co., et als.
Docket No. L 6702-90

Gentlemen:

This is a motion for summary judgment.

Plaintiff, Paterson Municipal Utilities Authority, commenced this action against defendants, Hackensack Water Company and North Jersey District Water Supply Commission. Defendants are joint venturers in the Wanaque South Project. Plaintiff contends that it is the sole owner of riparian water rights at the Great Falls in Paterson, and that it has been damaged by defendants' upstream diversion of water from the Passaic, Pompton and Ramapo Rivers. I conclude there is no diversion giving rise to a cause of action for damages, and grant defendants' motion.

Plaintiff alleges that it is the successor in interest to the City of Paterson, which in turn, is the successor to the Society for Establishing Useful Manufacturers (hereinafter SUM). The SUM was established by the New Jersey legislature in November, 1791. *L.* 1971, *Pat.* 103, § 1, et seq. Plaintiff contends that the legislature, by this Act, granted the SUM the full use and benefit to the waters running by and through the Great Falls, which right was to be without "diminution or alteration."

Although the legislature empowered the SUM to purchase property, to cut canals and clear channels of rivers, and to collect tolls for the passage of vessles on any canals built or rivers rendered navigable by the SUM, it did not explicitly grant the SUM the exclusive right to the undiminished flow of the waters of the Great Falls. In *Society For Establishing Useful Manufacturers v. Morris Canal & Banking Company*, 30 *N.J. Eq*, 145, at p. 162 footnote, the court observed:

> ". . . And when the society acquired a title to the lands, they acquired a right to appropriate and use the waters for manufacturing purposes, without any special grant in their charter of a right to do so. . . ."

Moreover, the cases plaintiff cites to support its contention of an exclusive right, cannot be interpreted as a finding or conclusion by these courts that the legislature intended that the riparian rights acquired by the SUM are greater than the riparian rights of any other owner. These courts merely recognized that the SUM possessed the common law rights of a riparian owner. Thus, in *Society For Establishing Useful Manufacturers v. Morris Canal Co.*, 1 *N.J. Eq.* 157 (Ch. 1830), the Chancellor observed that the SUM had a right to take all the waters from the stream, provided it is restroed after being used, and provided that no one having prior rights is injured. "Such, I take to be the common law rights of the society, independent of any additional privileges that may be secured to them by their charter. What they may be, if any exists, it appears to me unnecessary now to inquire."

There is another reason to conclude that the cases cited by plaintiff do not support the proposition for which they are offered; viz., that the SUM's rights to the waters running by the Great Falls were to be held without a diminution or alteration. Those cases relied upon earlier English precedents that apply the "natural flow theory; i.e., that every proprietor "who claims a right, either to throw the water back upon the lands of his neighbor above, or to diminish the quantity of water which is usually descended to the proprietor below, must prove either a grant or license from such proprietor, or twenty years uninterrupted enjoyment."

Our Supreme Court has more recently adopted the American or "reasonable use" rule. *Armstrong v. Francis Corp.*, 20 *N.J.* 320 (1956). That rule allows each possessor to make reasonable use of his land, even though the flow of surface waters is thereby altered or causes some harm to others, but he occurs liability when his harmful interference with the flow of waters is unreasonable. *Id.* at p. 327. The "reasonable use" rule was applied in *Borough of Westville v. Whitney Home Builders*, 40 *N.J. Super* 62 (App.Div. 1956), an action seeking to enjoin a housing builder and town from discharging affluent from a sewerage disposal plant into a pond in a recreational park. After considering the history of the law governing the mutual rights and obligations of reparian owners, as well as examining the "natural flow" theory and the "reasonable use" doctrine, the court stated:

> "On principle, we conclude that the interests of a changing, complex and technologically mushrooming society call for the application of the "reasonable use" doctrine in this field; a rule which enables judicial arbitration, in the absence of controlling legislation, of the fair participation in common waters of those who have a right of property therein on the basis of what all of the attendant circumstances shows to be reasonable. On analysis of the case authorities, we think the courts have actually moved along that course, whatever the occa-

sional ideological conflict in expression. . . ." *Id.* at pp. 80-81.

Because plaintiff does not have greater rights than any other riparian owner to the waters of the Passaic River, it is not entitled to damages from defendants unless defendants have exercised their riparian rights unreasonably. And, although the determination of "reasonableness" is ordinarily a question of fact, it is, in the circumstances of this case, as issue of law.

On August 11, 1975, defendants filed applications with the Water Policy and Supply Council for a joint project, which became the Wanaque South Project. At that time, South Paterson owned a non-operating hydroelectric plant at the Great Falls, but was planning a new hydroelectric facility. The Council approved the project contingent upon compliance with the Historic Site Law insofar as the Great Falls was concerned.

The N.J.D.E.P. commissioner approved the grant of diversion permits to defendants and allowed encroachment on the Great Falls. He recognized the conflict between the need for an adequate water supply and the need to maintain the aesthetic value of the Great Falls, and accommodated each by the imposition of appropriate conditions to the permit. On appeal, the Appelllate Division affirmed the commissioners' determination. *In Re North Jersey District Water Supply Commission*, 175 *N.J. Super* 167 (App.Div. 1980).

In 1981, the legislature enacted the Water Supply Management Act. *N.J.S.A.* 58:1A-1, et seq.. In doing so, it found that the "water resources of the state are public assets of the state held in trust for its citizens", "that ownership of these assets is in the state", and the Act was necessary to insure adequate water supplies. *N.J.S.A.* 58:1A-2. On October 10, 1985, plaintiff obtained a permit from the N.J.D.E.P., under whose auspicies the Water Supply Management Act is administered, permitting it to divert water for the use of hydroelectric generation. The permit contains a provision:

"7. This permit shall not be construed as affecting in any way the validity of the diversion permits held by other permitees. This permit shall not govern any claim for damages resulting from any future depletion of the flow of the water of the Passaic River and its tributaries asserted by the applicant under claim of water rights acquired pursuant to State law."

The permits granted to defendants by the N.J.D.E.P. are renewals of earlier permits and antedate the permit received by plaintiff, Plaintiff's license issued by the Federal Energy Regulatory Commission in March 1981, expressly provides that plaintiff's water rights acquired pursuant to State law, not this license", shall govern any claim for damages made by plaintiff for damages resulting from the depletion of water flow.

Accordingly, since the N.J.D.E.P., through the Water Supply Management Act determined the appropriate allocation of the state's water resources to be allowed to the defendants, any use by defendants within this allocation is, as a matter of law, reasonable.

Plaintiff's claim for damages resulting from the impairment of the aesthetic value of the Great Falls is not based upon the Great Falls designation as an historic landmark, but rests upon defendants unlawful interference with undiminished water flow at the Great Falls. Because, for reasons previously stated, plaintiff is not entitled to an undiminished flow, it cannot maintain its cause of action for damages resulting to the aesthetic value of the Great Falls.

For these reasons, defendants' motion for summary judgment is granted. Defendants will please submit an appropriate form of judgment on five days' notice.

Thank you.

Very truly yours,

/s/ ROBERT S. ALTERMAN, J.S.C.

ROBERT S. ALTERMAN, J.S.C.

HSA:sdr

Filed June 7, 1994

SUPREME COURT OF NEW JERSEY
DOCKET NO. 38,721

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-487-92T2

CRIMINAL ACTION

PATERSON MUNICIPAL UTILITIES AUTHORITY,
a Public Body,

Plaintiff,

—VS.—

HACKENSACK WATER COMPANY, a Corporation, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION, a Public Body,

Defendants.

ON PETITION FOR CERTIFICATION OF FINAL JUDGMENT OF NEW JERSEY SUPERIOR COURT, APPELLATE DIVISION

Sat Below:

Superior Court
Appellate Division
Judge Gaulkin, R.S. Cohen,
and D'Annunzio, JJ.A.D.

PETITION FOR CERTIFICATION AND APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER PATERSON MUNICIPAL UTILITIES AUTHORITY

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Attorneys for Plaintiff-
Appellant-Petitioner

STATEMENT OF THE MATTER INVOLVED

This matter involves the summary dismissal of plaintiff's claim for damages for infringement of its riparian rights caused by the upstream diversions of water by defendants. Petition for Certification is sought as to:

(1) clarification of the rights of riparian owners under New Jersey law after *Armstrong v. Francis Corp.*, 20 N.J. 320 (1956), particularly where non-riparian users take water for sale off-site to the detriment of riparian owners;

(2) recognition of plaintiff's entitlement to payment under both the United States Constitution and the New Jersey Constitution for the taking of water rights, *U.S. Const.* Amendment 5, 14, *N.J.Const.* Art.1, ¶ 20, *N.J.S.A.* 58:1A-12, and *N.J.S.A.* 58:5-16;

(3) the unconstitutionality of the Water Supply Management Act ("WSMA"), *N.J.S.A.* 58:1A-1 *et seq.*, as

applied to the plaintiff in light of *L.* 1791, *Pat.* 104, and *N.J.S.A.* 58:5-16;

(4) recognition of a claim of unjust enrichment for the taking of water rights; and

(5) application of the doctrine of estoppel by deed to a deed of water rights.

Guidance is sought to resolve conflicts between the following lower court opinions rendered after *Armstrong*, *supra*: *In Re North Jersey Dist. Water Supply Comm'n*, 175 N.J. Super. 167 (App. Div. 1980), *cert. den.*, 85 N.J. 460 (1981) ("remedy would be an action for damages" after Paterson's water rights infringed pursuant to permit); *Borough of Westville v. Whitney Home Builders*, 40 * * *

QUESTIONS PRESENTED

1. Does the "reasonable use" doctrine expressed in *Armstrong v. Francis Corp.*, 20 N.J. 320 (1956), apply to the payment of damages where a non-riparian user takes water for sale off-site to the detriment of riparian owners?

2. Does the taking of water by permit give rise to a claim for the payment of damages as a result of an infringement upon plaintiff's riparian rights pursuant to *U.S. Const.* Amendment 5, 14, *N.J. Const.* Art.1, ¶ 20, *N.J.S.A.* 58:1A-12, and *N.J.S.A.* 58:5-16?

3. Is the interpretation given *Armstrong* by the Appellate Division consistent with a constitutional interpretation of the Water Supply Management Act ("WSMA"), *N.J.S.A.* 58:1A-1 *et seq.*, when read *in pari materia* with *L.* 1791, *Pat.* 104, and *N.J.S.A.* 58:5-16?

4. Does a claim of unjust enrichment lie against defendants for the encroachment and/or infringement upon plaintiff's water rights?

Filed January 22, 1993

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-487-92T2

Civil Action

PATERSON MUNICIPAL UTILITIES AUTHORITY,
a Public Body,

Plaintiff,

—vs.—

HACKENSACK WATER COMPANY, a Corporation, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION, a Public Body,

Defendants.

On Appeal From the Order Granting Summary Judgment of the Superior Court of New Jersey, Law Division, Passaic County

SAT BELOW:

Honorable Herbert S. Alterman

BRIEF ON BEHALF OF PLAINTIFF/APPELLANT, PATERSON MUNICIPAL UTILITIES AUTHORITY

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LEGAL ARGUMENT

POINT I

THE FAILURE OF DEFENDANTS AS PERMITTEES TO PAY FOR THE WATER THEY TAKE CONSTITUTES AN UNLAWFUL TAKING OF PLAINTIFF'S PROPERTY WITHOUT JUST COMPENSATION.

A. THE FAILURE OF THE DEFENDANTS TO PAY PMUA FOR THEIR TAKING VIOLATES BOTH THE UNITED STATES AND NEW JERSEY CONSTITUTIONS.

Article I, Section 20 of the New Jersey Constitution provides in relevant part, as follows: "Private property shall not be taken for public use without just compensation." *N.J.Const.* Art.1, ¶ 20. Similarly, the United States Constitution provides that, "No person shall. . .be deprived of. . .property, without due process of law; nor shall private property be taken for public use, without just compensation." *U.S. Const*, Amendment 5, 14.

For the purpose of this submission, it is not necessary to distinguish between the federal "takings clause" and that promulgated under the New Jersey Constitution. Our Supreme Court has found in its analysis of certain aspects of both promulgations that "our own state constitutional principles governing the taking of property are in general conformity [with the federal constitutional doctrine]." *Gardner v New Jersey Pinelands Comm'n.*, 125 N.J. 193, 205 (1991).

It is clear as set forth below that: (1) the actions of the defendants have constituted a violation of the "Takings Clauses" of both the New Jersey and United States Constitutions, and (2) the trial court erred when it determined that the WSMA, *N.J.S.A.* 58:1A-1, *et seq.* and permits issued to defendants operated to deprive PMUA * * *

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: PASSAIC COUNTY
DOCKET NO. PAS-L-6702-90

CIVIL ACTION

PATERSON MUNICIPAL UTILITIES AUTHORITY,
a Public Body,

Plaintiff,

—vs.—

HACKENSACK WATER COMPANY, a Corporation, and NORTH JERSEY DISTRICT WATER SUPPLY COMMISSION, a Public Body,

Defendants.

PLAINTIFF PATERSON MUNICIPAL UTILITIES AUTHORITY'S BRIEF IN OPPOSITION TO SUMMARY JUDGMENT MOTION.

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Joanne L. Graf, Esq.

* * *

three such payment agreements by defendants to compensate plaintiff for State permit authorized diversions.

Reading the two operative legislative acts together with the other cited law and constitutional provisions, only one conclusion is clear: while the State does possess a substantial and compelling interest in monitoring the State's water supply and in adopting a system of permits to effectuate its interest, the State does not have the right to deny a person or entity of its rights without just compensation. Such a conclusion is painfully obvious upon a thorough reading of the WSMA and the statutory grant to the NJDWSC to exercise powers at eminent domain.

Such a reading is also required if the act is to pass constitutional muster. If read as defendants allege it would represent an unconstitutional taking without due process. It is designed specifically to adopt a system of permits to enable it to manage the water supply of the State. It does not have the unabashed right to take property without compensating the injured party. "If the language under study admits of two interpretations, one rendering the statute invalid and the other valid, the construction sustaining constitutionality will be adopted." *State v. Monroe*, 30 N.J. 160, 165 (1959). As aptly stated in *State in Interest of R.G.W.*, 145 N.J.Super. 167, 182 (Juv.&Dom.Rel. 1976):

> The spirit of legislative direction prevails over its general terms. *Dvorkin v. Dover Twp.*, 29 N.J. 303, 315 (1959). The fundamental purpose for which the legislation was enacted controls. *New Jersey Builders, etc. Ass'n v. Blair*, 60 N.J. 330, 338 (1972).

Furthermore, all the quoted language in the movant's brief from Senate hearings also confirms that the idea of eliminating "grandfather rights" only dealt with the issue of use or allocation of water. It had absolutely nothing to do with proprietary interests which cannot he abridged without due process.

As to the language in the WSMA which states that "ownership of these assets is in the State as trustee of the people.." (*N.J.S.A.* 58:1A-2), it does not mean that the State has taken everyone's water rights without compensation. That would be unlawful. *U.S.Const.* Amendment V; *N.J.Const.* Art. I, para. 20. Its status is clearly intended as the overseer to allocate these state resources fairly. This is most evident by the language found in the different permits under WSMA, discussed above. It must be noted again, however, that the plaintiff's rights by statute and federal license pre-empt state control under WSMA.

And finally, the statutory provision which provides that if diversion is greater than 100,000 gallons per day a permit must be obtained (*N.J.S.A.* 58:1A-7(a)), contains a specific exclusion:

> Except as provided by section 6 of the act, no person may divert more than 100,000 gallons per day of any waters of the State. . .unless he obtains a diversion permit.

And, section 6 provides in relevant part that in developing the permit system, the department shall:

> *Permit privileges previously allowed pursuant to lawful legislative or administrative action*, except that the department may, after notice and hearing, limit the exercise of these privileges to the extent currently exercised, subject to contract, or reasonably * * *

CONSTITUTION
OF THE
UNITED STATES OF AMERICA

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty , or property, without due process of law; nor shall private property be taken for public use, without just compensation.

58:1A-1. Short title

This act shall be known and may be cited as the "Water Supply Management Act."

L.1981, c. 262, § 1, eff. Aug. 13, 1981.

58:1A-2. Legislative findings and declarations

The Legislature finds and declares that the water resources of the State are public assets of the State held in trust for its citizens and are essential to the health, safety, economic welfare, recreational and aesthetic enjoyment, and general welfare, of the people of New Jersey; that ownership of these assets is in the State as trustee of the people; that because some areas within the State do not have enough water to meet their current needs and provide an adequate margin of safety, the water resources of the State and any water brought into the State must be planned for and managed as a common resource from which the requirements of the several regions and localities in the State shall be met; that the present regulatory system for these water resources is ineffective and counterproductive; that it is necessary to insure that within each basin there exist adequate water supplies to accommodate present and future needs; that to ensure an adequate supply and quality of water for citizens of the State, both present and future, and to protect the natural environment of the waterways of the State, it is necessary that the State, through its Department of Environmental Protection, have the power to manage the water supply by adopting a uniform water diversion permit system and fee schedule, a monitoring, inspection and enforcement program, a program to study and manage the State's water resources and plan for emergencies and future water needs, and regulations to manage the waters of the State during water supply and water quality emergencies.

L.1981. c. 262, § 2, eff. Aug. 13, 1981,

58:1A-3. Definitions

As used in this act:

a. "Commissioner" means the Commissioner of the Department of Environmental Protection[1] or his designated representative;

b "Consumptive use" means any use of water diverted from surface or ground waters other than a nonconsumptive use as defined in this act;

c. "Department" means the Department of Environmental Protection;

d. "Diversion" means the taking or impoundment of water from a river, stream, lake, pond, aquifer, well, other underground source, or other water body, whether or not the water is returned thereto, consumed, made to flow into another stream or basin, or discharged elsewhere;

e. "Nonconsumptive use" means the use of water diverted from surface or ground waters in such a manner that it is returned to the surface or ground water at or near the point from which it was taken without substantial diminution in quantity or substantial impairment of quality;

f. "Person" means any individual, corporation, company, partnership, firm, association, owner or operator of a water supply facility, political subdivision of the State and any state, or interstate agency or Federal agency;

g. "Waters" or "waters of the State" means all surface waters and ground waters in the State.

L.1981, c. 262, § 3, eff. Aug. 13, 1981.

---

[1] Now Department of Environmental Protection and Energy, see Reorganization Plan No. 002-1991, set out under § 13:1D-1.

58:1A-4. State of water emergency; emergency water supply allocation plan; powers of Governor and commissioner; orders; review

a. Upon a finding by the commissioner that there exists or impends a water supply shortage of a dimension which endangers the public health, safety, or welfare in all or any part of the State, the Governor is authorized to proclaim by executive order a state of water emergency. The Governor may limit the applicability of any state of emergency to specific categories of water supplies or to specific areas of the State in which a shortage exists or impends.

b. The department shall, within 180 days of the effective date of this act, adopt an Emergency Water Supply Allocation Plan as a rule and regulation. This plan shall be utilized as the basis for imposing water usage restrictions during a declared state of water emergency and shall include a priority system for the order in which restrictions would be imposed upon the various categories of water usage.

c. During the duration of a state of water emergency the commissioner, to the extent not in conflict with applicable Federal law or regulation but notwithstanding any State or local law or contractual agreement, shall be empowered to:

(1) Order any person to reduce by a specified amount the use of any water supply; to make use of an alternate water supply where possible; to make emergency interconnections between systems; to transfer water from any public or private system; or to cease the use of any water supply;

(2) Order any person engaged in the distribution of any water supply to reduce or increase by a specified amount or to cease the distribution of that water supply; to distribute a specified amount of water to certain users as specified by the commissioner; or to share any water supply with other distributors thereof;

(3) Establish priorities for the distribution of any water supply;

(4) Adopt rules and regulations as are necessary and proper to carry out the purposes of this section; and

(5) Direct any person engaged in the retail distribution of water to impose and collect a surcharge on the cost of that water as a penalty for the violation of any order to reduce water usage issued pursuant to this subsection. The disposition of all sums collected pursuant to this subsection shall be as provided by law; and

(6) Otherwise implement the Emergency Water Supply Allocation Plan adopted pursuant to subsection b. of this section.

58:1A-5. Supply and diversion of water; rules and regulations

The commissioner shall have the power to adopt, enforce, amend or repeal, pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C. 52:14B-1 et seq.) rules and regulations to control, conserve, and manage the water supply of the State and the diversions of that water supply to assure the citizens of the State an adequate supply of water under a variety of conditions and to carry out the intent of this act. These rules and regulations may apply throughout the State or in any region thereof and shall provide for the allocation or the reallocation of the waters of the State in such a manner as to provide an adequate quantity and quality of water for the needs of the citizens of the State in the present and in the future and may include, but shall not be limited to:

a. A permit system to allocate or reallocate any or all of the waters of the State, which system shall provide for the issuance of permits to diverters of more than 100,000 gallons per day of the waters of the State, containing at a minimum the conditions required by this act;

b. Standards and procedures to be followed by diverters to ensure that:

(1) Proper methods are used to divert water;

(2) Only the permitted quantity of water is diverted and that the water is only used for its permitted purpose;

(3) The water quality of the water source is maintained and the water standards for the use of the water are met;

(4) The department is provided with adequate and accurate reports regarding the diversion and use of water;

c. Inspection, monitoring, reporting and enforcement procedures necessary to implement and enforce the provisions of this act;

d. Standards and procedures to be followed to determine the location, extent and quality of the water resources of the State and plan for their future use to meet the needs of the citizens of the State;

e. Standards and procedures to be followed to maintain the minimum water levels and flow necessary to provide adequate water quantity and quality;

f. Standards and procedures governing the maintenance of adequate capacity by, and withdrawal limits for, water purveyors.

L.1981, c. 262, § 5, eff. Aug. 13 1981.

58:1A-6. Continuation of existing water diversion permits; persons diverting over 100,000 gallons per day; water usage certification program

a. The department in developing the permit system established by this act shall:

(1) Permit privileges previously allowed pursuant to lawful legislative or administrative action, except that the department may, after notice and hearing, limit the exercise of these privileges to the extent currently exercised, subject to contract, or reasonably required for a demonstrated future need. All diversion permits issued by the Water Policy and Supply Council prior to the effective date of this act shall remain in effect until modified by the department pursuant to this act.

Persons having or claiming a right to divert more than 100,000 gallons of water per day pursuant to prior legislative or administrative action, including persons previously exempted from the requirement to obtain a permit, shall renew that right by applying for a permit, or water usage certification, as the case may be, within 180 days of the effective date of this act. Thereafter, the conditions of the new permit or certification shall be deemed conclusive evidence of such previously allowed privileges.

(2) Require any person diverting 100,000 or more gallons of water per day for agricultural or horticultural purposes to obtain approval of the appropriate county agricultural agent of a 5 year water usage certification program. This approval shall be based on standards and procedures established by the department. This program shall include the right to construct, repair or reconstruct dams or other structures, the right to divert water for irrigation, frost protection, harvesting and other agriculturally-related purposes, and the right to measure the amount of water diverted by means of a log or other appropriate record, and shall be obtained in lieu of any permit which would otherwise be required by this act.

b. Nothing in this act shall prevent the department from including, or requiring the department to include, the presently nonutilized existing privileges in the new or any future diversion permits issued to the present possessors of these privileges, except as otherwise expressly provided in subsection a. of this section.

L.1981, c. 262, § 6, eff. Aug. 13, 1981. Amended by L.1981, c. 277, § 3, eff. Sept. 8, 1981.

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58:1A-8. Contents of permit

Every permit issued pursuant to this act shall include provisions:

a. Fixing the term of the permit;

b. Fixing the maximum allowable diversion, expressed in terms of a daily or monthly diversion;

c. Identifying and limiting the use or uses to which the water may be put;

d. Requiring the diverter to meter the water being diverted and report the amount and quality of the water being diverted;

e. Allowing the department to enter the diverter's facilities or property to inspect and monitor the diversion;

f. Requiring that all water diverted for a nonconsumptive use be returned to a reasonably proximate body of water designated by the department;

g. Allowing the transfer of a permit with the consent of the department, but only for the identical use of the waters by the transferee;

h. Governing the operations and maintenance of the specific facilities, equipment or premises not otherwise established in regulations because of the unique nature of the facilities, equipment or premises;

i. Permitting the department to modify, suspend or terminate the permit, after notice and hearing, for violations of its conditions, this Act, regulations adopted or orders issued by the department, and when deemed necessary for the public interest.

L.1981. c. 262, § 8. eff. Aug. 13, 1981.

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58:1A-11. Administrative fees: diversion permits; disposition

The department shall in accordance with a fee schedule adopted by rule and regulation, establish and charge reasonable administrative fees, which fees shall be based upon, and not exceed, the estimated cost of processing, monitoring, administering and enforcing the diversion permits. The department shall deposit the fees in the "Environmental Ser-

vices Fund" created by P.L.1975, c. 232 (C. 13:1D-30 et seq.). There shall be annually appropriated an amount equivalent to the amount anticipated to be collected as fees by the department for the administration of the water supply management program.

L.1981, c. 262, § 11, eff. Aug. 13, 1981.

58:1A-12. Condemnation for new or additional supply of water; approval by department

No person supplying or proposing to supply water to any other person shall have the power to condemn lands, water or water privileges for any new or additional source of ground or surface water until that person has first submitted to the department an application for approval to divert the source of the water and the department has approved the application subject to such conditions as it may determine to be necessary to protect the public health and welfare.

L.1981, c. 262, § 12, eff. Aug. 13, 1981.